FCC COMMENTS ON BELLSOUTH EMERGENCY PETITION

The Public Service Commission of South Carolina (the South Carolina Commission) wishes to comment on the Federal-State jurisdictional aspects of the BellSouth Telecommunications, Inc. (BellSouth) "Emergency Request for Declaratory Ruling (the Emergency Petition). BellSouth correctly asserts that the South Carolina Commission did not implement a requirement that BellSouth must furnish DSL service to customers using competitive local exchange carrier's (CLEC's) lines which utilize the UNE-P platform, (*See* Order on Arbitration, *Petition of IDS Telcom, LLC for Arbitration*, Docket No. 2001-19-C, Order No. 2001-286, at 28 (dated April 3, 2001)). However, the South Carolina Commission believes that the preemption now sought by BellSouth in the Emergency Petition before the Federal Communications Commission (FCC) is improper and unwarranted, and, for the reasons stated below, that the Emergency Petition should be denied and dismissed summarily.

The Emergency Petition, *inter alia,* purports to invoke the "exclusive jurisdiction over interstate telecommunications" to effect a preemption of State Commission decisions from Florida, Georgia, Louisiana, and Kentucky. Although the South Carolina Commission does not dispute that the FCC has exclusive jurisdiction over interstate telecommunications, the South Carolina Commission asserts that the communications matter at issue is not exclusively interstate in character. It should be pointed out that increasing competition in the area of telecommunications services, including those services with an interstate aspect, have become the responsibility of both the federal and the state legislatures. Cases such as *Michigan Bell Telephone Company v. MCIMetro Access Transmission Services, Inc.*, 323 F. 3d 348 (6th Cir. 2003) espouse the

principle of "cooperative federalism," and describe this concept as "harmoniz[ing]" the efforts of federal and state agencies. The FCC itself has recognized such a principle noting that "state commission authority over interconnection agreements pursuant to section 252 extends to both interstate and intrastate matters." *See* Reciprocal Compensation Ruling, Paragraph 25, quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15449, Paragraph 84, 1996 WL 452885 (1996).

In *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), the United States Supreme Court elucidated the principle that the world of domestic telephone service may not be divided "neatly into two hemispheres," with the interstate service being regulated by the FCC and the intrastate service being solely under State jurisdiction. The Court observed that "the realities of technology and economics belie such a clean parceling of responsibility." The Court further held that "the critical question in any preemption analysis is whether Congress intended that federal regulation supersede state law." 476 U.S. at 369.

The Sixth Circuit has held that courts must begin with the presumption that state law is valid, when a law is not expressly preempted. *Springston v. Consolidated Rail Corp., 130 F. 3d 241* (6th Cir. 1997). Further, this case held that it will not be presumed that a federal statute was intended to supersede the exercise of power of the state unless there is a clear manifestation of intention to do so. "The exercise of federal supremacy is not lightly presumed." *See, New York State Dept. of Soc. Services v. Dublino*, 413 U.S. 405, 415 (1973).

The U.S. District Court, Eastern District of Kentucky case of *BellSouth Telecommunications, Inc. v. Cinergy Communications Company, et al.* (Civil Action No. 03-23-JMH, December 29, 2003), which ruled on the exact DSL matter contemplated by the FCC in this Docket, is helpful in further explaining this concept. The District Judge pointed out that when Congress enacted the Telecommunications Act of 1996, it did not expressly preempt state regulation of interconnection. In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized States to implement additional requirements that would foster local competition and interconnection. Further, the District Judge points out that Section 251(d)(3) of the Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that would establish interconnection and are consistent with the Act. 47 U.S.C. Section 251 (d)(3). Dist. Ct. case at 14.

The Kentucky District Court also notes that the Telecommunications Act of 1996 permits a great deal of state commission involvement in the new regime it sets up for the operation of local telecommunications markets, "as long as state commission regulations are consistent with the Act." *Michigan Bell Tel. Co.,* 323 F. 3d at 359, citing *Verizon North, Inc. v. Strand,* 309 F. 3d 935 (6th Cir. 2002). The FCC has stated that, as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted. The Kentucky District Court found that nothing in the Kentucky state regulations stands as an obstacle to the accomplishment and full execution of the full objectives of Congress. Dist. Ct. case at 15.

Accordingly, the Kentucky Federal District Court held that the Kentucky Public Service Commission Order established "a relatively modest interconnection-related

condition for a local exchange carrier so as to ameliorate a chilling effect on competition for local telecommunication regulated by the Commission." *Id.* The Court concluded that the Commission Order does not substantially prevent implementation of federal statutory requirements, and that there is therefore no federal preemption of Kentucky law. *Id. At 15-16.*

It should be noted that BellSouth seeks preemption of "relatively modest interconnection-related conditions" in Florida, Georgia, and Louisiana as well as Kentucky, in contradiction of the desires of those State Commissions as expressed in arbitration orders. The South Carolina Commission believes that the reasoning of the Kentucky District Court applies to the Florida, Georgia, and Louisiana cases, as well as to the Kentucky case. BellSouth has failed to show in its Emergency Petition that any of the Orders in question violate Federal statutory requirements, nor has BellSouth shown how the rulings in the four states prevent a carrier from taking advantage of sections 251 and 252 of the Act. In this light, under the established case law, BellSouth has made no showing that federal preemption is appropriate under this scenario. Even though the South Carolina Commission came to a different conclusion than the Commissions of the four states mentioned herein, it is the right of a State to make policy decisions on such matters, based on the particular facts and circumstances in the various states. What is good policy in Georgia may not necessarily be good policy in South Carolina, and vice versa. The States must be free to make their own individual decisions about what is best for the particular state, as long as that decision does not interfere with the objectives of Congress.

Because BellSouth has failed to make the necessary showing of how the actions of the Georgia, Florida, Louisiana, and Kentucky Commission interfere with Congressional objectives as expressed in the Telecommunications Act of 1996, the Emergency Petition of BellSouth should be denied and dismissed.

Respectfully submitted,

/s/

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